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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

versus

MOBILE STEAMSHIP ASSOCIATION, INC.
and ROBERT E. MALONE,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF RESPONDENT ROBERT E. MALONE IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama dated May 3, 1973, affirming the granting of a temporary injunction by the Circuit Court of Mobile County, Alabama, is reported at 279 So.2d 467, and is set forth in petitioners' Appendix C. The denial by the Supreme Court of Alabama of petitioners' application for rehearing, dated July 5, 1973, and which was entered without opinion, is set forth in petitioners' Appendix D.

The order of the Circuit Court of Mobile County, Alabama, dated November 11, 1971, is set forth in petitioners' Appendix E.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTIONS PRESENTED

1. Whether the state court was correct in concluding that it had jurisdiction to enjoin picketing by petitioners, American unions in a labor dispute with foreign-owned, foreign-flag ships manned by foreign crews represented by foreign unions, which effectively shut down the Port of Mobile, where the state court concluded that the picketing by petitioners had as one of its purposes the interference with the businesses of neutral third parties in violation of valid state policy.

2. Whether the state court, upon finding that the picketing by petitioners was counter to state policy in a domain open to state regulation, violated petitioners' First and Fourteenth Amendment rights by granting a temporary injunction restraining said picketing which effectively shut down the Port of Mobile.

STATUTES INVOLVED

Respondent contends that the jurisdictional scope of the Labor Management Relations Act, as amended, 29 U.S.C. §§141-187, does not extend to the conduct

of parties to disputes which relate to the internal affairs of foreign ships. This question cannot be answered by reference to any particular section of the Act which literally construed would answer the question.

Respondent further contends that the picketing by petitioners for the purpose of wrongfully interfering with respondent's occupation as a farmer is contrary to a valid policy of the State of Alabama reflected, in part, by statute, viz:

> "Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement, or understanding for the purpose of hindering, delaying or preventing any other persons, firms, corporations, or associations of persons from carrying on any lawful business, shall be guilty of a misdemeanor." Ala. Code, Tit. 14, §54 (1958), p. 60.

> "Any person, firm, corporation, or association of persons who uses force, threats, intimidation, or other unlawful means to prevent any other person, firm, corporation, or association of persons from engaging in any lawful occupation or business shall be guilty of a misdemeanor." Ala. Code, Tit. 14, §54 (1958), p. 61.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent Malone contends that his rights guaranteed him and other farmers in like position under

Article 1, Section 6 of the Constitution of the State of Alabama (relevant part of which is set forth hereinafter) were being violated by petitioners' pickets.

STATEMENT OF THE CASE

Petitioners' brief is so replete with omissions regarding a critical issue — the real intent, purpose and result of the pickets, as to require this respondent to present a Statement of the Case.

This case has as its beginning September 30, 1971, the expiration date of the agreement between one of the petitioners' affiliated unions, the International Longshoremen's Association ("ILA") and the employer bargaining agent, respondent Mobile Steamship Association. On October 1, 1971, the ILA commenced its strike against the Steamship Association, thereby shutting down the Port of Mobile. At the time of the strike, one of the foreign owned vessels in the Port was the BEL HUDSON, which arrived on October 1, 1972, under the elevator spouts at the Alabama State Docks ("Docks") ready to receive a cargo of soybeans (p. 79a). [Unless otherwise noted, all page references shall refer to Petitioners' Appendix to Petition for subject Writ of Certiorari.]

At the time of the ILA strike, soybean farmers had started to harvest their crops of beans to be sold and delivered at the Docks elevator, for export.

Respondent Malone is a soybean farmer in Mobile County (p. 79a). He was not involved in any labor dis-

pute, conflict or disagreement with any of the petitioners, respondent Steamship Association, or anyone else (p. 134-135a). He had to borrow money to rent the land to grow his soybeans (p. 79a), as did other farmers who had to borrow money in order to buy seed and fertilizer for their bean crop (p. 77a).

The public grain elevator at the State Docks in Mobile is the only facility for storing of soybeans in the area (p. 77a, 79a). In addition, there were thousands of other farmers in South Alabama who grew beans, and stood to lose a crop valued at $50,000,000.00, unless the grain elevator at the State Docks could load waiting vessels with cargoes of grain (p. 74a), and thereby make room for more grain to be stored in such elevator. Respondent Malone, together with hundreds of other farmers in South Alabama, had no on-farm storage facilities; and because of the perishable nature of soybeans, they must be harvested when ready, or the entire crop would be lost, due to shattering and falling on the ground, where they cannot be combined and picked up (p. 78a).

Strikes were also called in other Gulf ports by the ILA, but with less success than the efforts in Mobile. In Texas, the ports never stopped operating, as local ILA leaders refused to follow strike orders issued from the ILA International Headquarters in New York. In Louisiana, the National Labor Relations Board ("NLRB") secured an injunction under §10(1) of the National Labor Relations Act, compelling the longshoremen to return to work in the Port of New Or-

leans. At one point the Port of Mobile was the only major port on the Gulf Coast that was not working.

On November 3, 1971, the NLRB initiated efforts to secure a restraining order in the Port of Mobile pursuant to §10(1) of the NLRA. At approximately 12:00 a.m. on November 3, 1971, the Federal District Court in Mobile advised the parties that the temporary restraining order prayed for by the NLRB would issue against all ILA locals in the Port of Mobile (p. 69a).

Almost simultaneously with the Federal Court's decision to enter the temporary restraining order, at about 12:10 p.m. on November 3rd, petitioners established a picket line at all gates of the Alabama State Docks, where vessels were berthed, (p. 69a). These pickets were located at "every conceivable land surface entrance to the Alabama State Docks" until November 5, the day the State Court injunction suit was filed by respondent Steamship Association (testimony of Mr. Niera (p. 132a). On November 3rd, the Port of Mobile had at the Docks the following vessels: ILKON TAK, Liberian Flag, AQUA GLORY, Liberian Flag, BEL HUDSON, English Flag and PRESIDENT QUEZON, Phillipine Flag, (p. 96a). Petitioners' so-called "informational pickets" at all entrances to the Docks were directed against *all* of the vessels in port, as the same are named above (p. 81a), and these vessels were foreign flag vessels. The ILA refused to cross petitioners' picket lines (p. 117a), shutting down the whole port.

On November 5th, when the State Court injunction suit was filed, the situs of this picketing was shifted to the berths of two of such foreign flag vessels, the ILKON TAK and the AQUA GLORY, although the petitioners had instructions to picket *all* foreign vessels in the Port. (Testimony of Mr. Niera, p. 126a). Mr. Niera testified that 70-80% of the vessels that call at the Port of Mobile are foreign flag (p. 126a). These "informational" pickets that were supposed to tell the public of petitioners' plight were placed at the sides of the ILKON TAK and the AQUA GLORY berths at an almost deserted State Docks, far away from the public eye. One of the admitted purposes of doing this was to get the crews of these vessels to see the signs, so as to try and make their owners raise their wages (p. 138-139a). The AQUA GLORY had called at the Port of Mobile 3 times in the 6 months prior to the ILA strike, and none of the petitioners had attempted to picket her, and witness Macpherson further testified that in the past 13 years he had been in the steamship business in Mobile, none of petitioners had ever posted any informational pickets until the then present time (p. 71a).

Longshoremen and other of respondent Steamship Association's employees represented by locals of the ILA refused to cross petitioners' picket lines or to perform work or services incident to the loading and/or discharge of vessels in the Port (pp. 61-75a). Thus, the picketing prevented the Steamship Association and its members from performing its contracts to load and unload the foreign flag vessels picketed and brought to a halt their business operations in the Port.

As a result of the work stoppages induced by the picketing in question, irreparable injuries were being sustained by the respondent Steamship Association, its members and the Port of Mobile. These losses were particularized in the affidavit of J. R. Macpherson (p. 67a). Member companies of the Steamship Association were losing in excess of $15,000.00 per day in fixed overhead costs, including but not limited to salaries of office and supervisory staff and depreciation of equipment. Vessel demurrage costs were ranging from $2,000.00 to $5,000.00 per day per vessel. Ocean freight revenues were being lost at the rate of $35,000.00 per vessel per day. The loss to the economy of the City of Mobile resulting from the work stoppage was estimated to be in excess of $3,300,000.00 per week. Other forms of transportation, such as rail, barge, and truck lines which would have normally moved cargo in or out of the Port area were idled with resulting losses. Inland manufacturing plants were suffering the necessity of curtailing production and laying off personnel, all as a result of the inability of these plants to export their products and/or import raw materials used in the manufacturing process. One Liberian Flag vessel loaded with steel was anchored outside of the Port of Mobile, but would not come in, due to petitioners' shutting the Port down (pp. 84-85a).

In addition to the dock workers directly involved in the work stoppages at the Port, a large number of other employees directly connected with the industry were furloughed or laid off as a result of the strike. The Docks facilities of the State of Alabama which consisted of all of the wharves in the Port of Mobile

with a cost value in excess of $50,000,000.00, were largely idle with resulting losses of revenues. The pickets delayed the shipment of soybeans through the Port of Mobile, and if those shipments had not been commenced and completed, without interruption, it was estimated that the entire crop of approximately 13,000,000 bushels, valued at in excess of $50,000,000.00 would have been lost. Vessels which normally call at the Port of Mobile had been diverted to other ports. As mentioned earlier, other ports on the Gulf Coast were in operation and not under a strike. Cargo that was normally shipped through the Port of Mobile had been and was being diverted to open ports. Additionally, foreign shippers were substituting other world markets for their sales and purchases because of the strike and past experience indicated that when a normal flow of trade is diverted, a large percentage of that diverted would not revert to the Port of Mobile.

The result of the picketing by petitioners, if it had been allowed to continue, would have been disastrous. Millions of dollars worth of soybeans, well past the time they should have been harvested, would have been lost, with resulting loss to the community and to the farmers had the Petitioners been allowed to continue their announced purpose of picketing all foreign vessels in the Port. Although the unions eventually shifted the pickets to foreign flag vessels which were not located at the grain elevator, it was the stated purpose of the picketing to close up the entire Port of Mobile and to stop all foreign flag vessels from operating here (testimony of Mr. Niera (pp. 126-129a)), *and at a time when the only vessels in Port were those*

of foreign flag. Moreover, one of the vessels being picketed (the SS AQUA GLORY) and, thus, being prevented from unloading, was scheduled to load soybeans after her ore cargo was discharged. Mr. Niera admitted that the picketing was designed to prevent that vessel from loading soybeans from the Alabama State Docks Grain Elevator (p. 136a).

Not only were the soybean cargoes in jeopardy, the reputation of the Port and the economic interests of the community and members of the Steamship Association were threatened. Mobile stood to lose incalculable sums of money and business.

The magnitude of the crisis facing the Port of Mobile, and, indeed, the State of Alabama at the time the preliminary injunction was sought and granted is apparent from the transcript of the State Court proceedings.

Although the unions claim that their picketing was purely for the purpose of informing the American public of the plight of American seamen who had lost job opportunities to foreign seamen crewing foreign flag vessels, the following testimony of petitioners' only live witness, Mr. Niera, revealed the true purpose, intent and calculated result of such pickets:

(p. 125a)

"Q. Now Mr. Niera, are you familiar with the type flag vessels that call at the Port of Mobile?

A. Oh yes.
Q. What percentage of the vessels that call here at the Port are of foreign flags?
A. I would say about 70 to 80 percent.
Q. Yes sir. And it is your instructions from your international headquarters to picket 70 or 80 percent of the vessels that call at the Port of Mobile?
A. Within my resources, yes, to picket everyone.
Q. And you would assume, as a man knowledgeable in the field of labor picketing that good labor men and good union men would not cross those picket lines?
A. We were hoping that they wouldn't do that.
Q. Yes sir. And this hope has been fulfilled in the Port of Mobile as far as longshoremen are concerned, isn't that true?
A. Well, to a point, yes.
Q. Now, would it not be then a fair conclusion to say that you had hoped and do hope that you will be able to prevent 70 or 80 percent of the vessels in the Port of Mobile from loading or unloading cargo?
A. My hope is to clutter up the Port of Mobile with foreign ships — Liberian, Panamanian ships — to bring sufficient pressure on the United States Government to do something about the American Merchant Marine.
Q. That is your intention?
A. Yes sir.

Q. That is your purpose?
A. Yes sir."

(p. 130a)

"Q. ... You realize that your picketing is preventing members of the Association from loading and unloading these vessels that you are picketing?
A. I hope that my picket line will shut the whole State Docks down and let everybody go home for awhile. I hope I can do that. Not just the Mobile Steamship Association."

(pp. 143-144a)

"Q. Alright sir. Now, when you told these pickets to carry this sign that said 'don't patronize this vessel' —
A. Oh yes very polite.
Q. What did you mean by patronize?
A. The only sense that I can understand 'patronize', don't do nothing for it.
Q. Don't do any business?
A. That's right.
Q. Well you hope the longshoremen read the picket signs, don't you?
A. I hope everybody does.
Q. Yes sir. Including longshoremen?
A. Including longshoremen. Including Mobile Steamship Association."

(p. 140a)

"Q. Mr. Niera, you are trying to prevent the AQUA GLORY's last remaining cargo from being discharged and her being used to carry a cargo of grain (soybeans), aren't you?
A. Yes."

It is perfectly obvious that petitioners' purpose was to shut down the whole Port of Mobile (which they effectually did, until enjoined), so as to give their affiliated ILA union an excuse not to cross their picket lines, to the end that the ILA could have an excuse to disobey a Federal Judge's Order putting them back to work.

The above are the facts that were heard by the Trial Judge in the State Court on the original complaint of respondent Steamship Association, the intervening complaint of respondent Malone, the answer to the original complaint, and the affidavits and testimony of witnesses in open Court. The State Court refused respondents' request for an *ex parte* injunction, and set the matter down for trial after giving petitioners time to prepare their case.

With respect to the State Court injunction order not complained of by petitioners until approximately 1 year after it was issued, if petitioners considered that such order was vague in not being sufficiently precise to advise them of what they did wrong, the record is void of any effort to request more definitive findings. If petitioners considered that they were wrongfully enjoined and were suffering immediate and irreparable damage, it is incomprehensible why they did not immediately use the prompt review (to the

Alabama Supreme Court) provisions of Title 7, §1057 of the Code of Alabama. Instead of seeking prompt redress for any claimed wrongs, the transcript of the State Court proceeding is replete with requests for delays in taking an appeal to the State Supreme Court [7 requests totalling about 1 year to extend time to file a transcript which could not have taken over 2 days to prepare]. Again, the record fails to show any effort by petitioners to request any more definitive opinion from the State Supreme Court.

REASONS FOR DENYING THE WRIT

The evidence before the State Trial Court, and upon review by the State Supreme Court, showed clearly that petitioners' purpose in posting the pickets was not to inform the public, but to meddle in the internal affairs of foreign vessel owners, shut down the entire Port of Mobile, and render void a Mobile Federal Court's back-to-work order. Petitioners' activities were unlawful in scope and purpose, in violation of a valid State policy. The State Supreme Court was correct, and the Writ should be denied.

ARGUMENT

Petitioners contend that a farmer such as respondent Malone, whose crops could not be harvested and would rot in the field, has as his sole forum to determine his rights the NLRB. The posting of pickets beside the only vessels in the Port of Mobile, at isolated berths, inside the gates of the Docks, could only be for the purpose of attempting to organize its crews

and foment discord between such foreign crews and their foreign vessel owners-employers. However, once the Port was shut down by such pickets, the resulting clamor and wide disruption and economic chaos would be such as would reach the National Government level, where pressure would be exerted to alter our Government's international relationship with these foreign vessel owners. Neither of these illegal purposes is a proper activity, and the State Courts have the authority to hear injunctive procedure directed against such activities. *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957); *Incres Steamship Co. v. International Maritime Workers Union*, 372 U.S. 24 (1963); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

The cases cited by petitioners, *International Longshoremen's Association v. Ariadne Shipping Co., Ltd.*, 397 U.S. 195 (1970) and *Marine Cooks and Stewards Union v. Panama S.S. Co.*, 362 U.S. 365 (1960) are not applicable to this case. Neither case involved the intent, purpose and result of shutting down an entire Port or crippling the economy of a State. Further in *Ariadne*, the pickets were protesting low wages paid to American longshoremen by their employer, the foreign vessel owner. In *Marine Cooks and Stewards*, the Court simply held that a Federal Court could not issue an injunction, and expressly did not decide whether the picketing was tortious under State or Federal law (at p. 372).

The evidence as to the illegal intent and purpose of the pickets to shut down the entire Port shatters

petitioners' contention with respect to the exclusivity of the NLRB, as well as its remaining contention that such pickets' activities were within the free speech protection of the First Amendment. Petitioners' portrayal of the testimony of Mr. Niera as merely a random expression of a rank-and-file union man is simply not accurate. Mr. Niera was in charge of the pickets in the Port of Mobile, so far as petitioner SIU was concerned (pp. 142-143), and was presented to testify for all petitioners (p. 115a). Were the State Court judges to completely disregard Mr. Niera's testimony as to the purpose of the pickets, together with other testimony that showed this illegal purpose had been fulfilled by shutting down the whole Port? Were the State Courts to ignore the fact that the pickets were ultimately placed in remote areas, far from the public eye? In *International Brotherhood v. Vogt*, 354 U.S. 284 (1957), where pickets were placed upon a rural highway frequented by few people, the Court affirmed a State Court's finding that the purpose of the pickets was illegal. Were the State Courts to also ignore the undisputed fact that the pickets did not appear until within minutes after a Federal Judge had ordered the ILA back to work?

With respect to petitioners' claim of First Amendment protection, the purpose and method of this picketing was unlawful and is not protected by Federal law. Petitioners rely heavily upon *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, which certainly is inapplicable to this case. In *Logan Valley*, only 1 store in a public shopping center was being picketed, and the Court expressly found that the pickets

did not interfere with the public use, not only of the picketed store, but of the rest of the stores in the shopping center. There was neither purpose nor manner found to shut down the entire shopping center. *Logan Valley*, in addition to requiring a lawful manner and purpose to protect First Amendment rights, requires that this picketing be in such a manner as not to unduly interfere with the rights of others to use the picketed facility (at page 613 of Opinion). There is not present in *Logan Valley* or any other case cited by petitioners, a set of facts even resembling petitioners' purpose here, which was also to help an affiliated union defy a return-to-work Court Order.

Petitioners' First Amendment rights are not exclusive and paramount to the constitutional rights of all others. The States have the right to enforce their law to enjoin picketing done in the manner and for the purpose employed by these petitioners, *Teamsters Local 695 v. Vogt, supra; Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1948).

The pertinent part of Section 6 of Article 1 of the Alabama Constitution is, as follows:

> "... and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law ..."

This section applies to civil, as well as criminal law, *Pike v. Southern Bell*, 263 Ala. 59, 81 So. 2d 254.

The case law of Alabama with respect to protecting a man from wrongful interference with his business is expressed in *Sparks v. McCrary*, 156 Ala. 382, 47 So. 332 at page 334:

> "In necessary consequence, an unlawful invasion of or interference with the pursuit or progress of one's trade, profession, or business is a wrong for which an action lies. Holt, C.J., in Keeble v. Hickeringill, 11 East, 574, thus states the doctrine: 'He that hinders another in his trade or livelihood is liable to an action for so hindering him' — though it must be that he intended the broad declaration to be subject to the qualification that the hindrance, the act or conduct so resulting, be wrongful, unlawful, and this, *independent, as a general rule, of the motive or intent with which the hindrance was accomplished*. Id., 47 So. at 334." (Emphasis supplied)

Clearly this respondent's rights under Section 6 of the State Constitution were being violated.

With respect to Title 14, Section 54 of the State Code, the evidence was clear that not only was there a combination or conspiracy among petitioners' own "committee" to unlawfully prevent Malone from making a living farming, such combination and conspiracy spread into petitioners' affiliated union, the ILA.

The purpose of petitioners' activity clearly constituted unlawful means of depriving Malone of his right

to make a living in violation of Title 14, Section 57, *International Union v. Russell*, 246 Ala. 456, 88 So. 2d 175; *Klibanoff v. Tri-Cities Retail Clerks' Union*, 258 Ala. 479, 64 So.2d 393 (1953).

It is uncontroverted that respondent Malone had no quarrel with anyone — he just wanted to harvest the crop of beans he had planted, and petitioners' pickets were preventing there being any room at the only available elevator to store his beans. To Malone, petitioners' picketing was "punitive", *Pennington v. Birmingham Baseball Club, Inc.*, 277 Ala. 336, 170 So. 2d 410 (1964).

Petitioners violated Malone's constitutional rights, and contravened the valid State policy of law, as reflected in the Alabama Constitution, its statutes and its case law, and the evidence of such violation was so obvious as to compel the issuance of the injunction.

Petitioners complaint that a lack of State findings of fact and conclusions of law as to "anti-social conduct" has "left them in the dark". It is submitted that by never requesting any more definitive findings from either the State Trial Court or Supreme Court, petitioners decided long ago that their position, made frail and tenuous by the compelling weight of the evidence, deliberately chose not to request any more specific findings. In other words, finding the light of the evidence to be extremely harmful, petitioners have opted to assume a position of being "left in the dark". Such a position is of no avail. The State Supreme Court was entitled, from the transcript of the evidence before it, "to draw the inference" of the illegal purpose and manner of petitioners' pickets, as reflected in its opinion. *Vogt, supra*, pp. 294-295.

CONCLUSION

Petitioners accuse the State Supreme Court of conjuring up a new cause of action against them, and ignoring the decisions of this Court. Nothing could be further from the truth. The decision below followed the decisions of this Court and applied the valid State policy in expressing the framework structured by this Court within which petitioners' activities should be confined. The evidence showed clearly that petitioners' illegal purpose and manner of posting the pickets to be well beyond the limits for same, as declared by this Court. Petitioners demands that all the courthouse doors, State and Federal, be closed to farmer Malone, who is supposed to find recourse and solace in the NLRB whenever and wherever petitioners next decide to shut down a U. S. Port by picketing all foreign flag vessels calling or even intending to call at such Port. This raw, unbridled quest for power is not permitted by law, and must be denied.

The petition is due to be dismissed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Alex F. Lankford, III, attorney for respondent Robert E. Malone, do hereby certify that on this ____ day of January, 1974, three copies of the foregoing brief in opposition to the petition for writ of certiorari have been served on each of the following attorneys of record:

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Alex F. Lankford, III